

United States ↙

Circuit Court of Appeals

For the Ninth Circuit.

ARVID PEARSON and A. J. HENNESSY,
Appellants,

vs.

A. W. HIGGINS, as Trustee in Bankruptcy of
LOUIS MORGAN, a Bankrupt,
Appellee.

Transcript of Record.

Upon Appeal from the United States District Court for the
Northern District of California, Southern Division.

FILED

MAY 20 1928

PAUL P. O'BRIEN,
Clerk

United States
Circuit Court of Appeals
For the Ninth Circuit.

ARVID PEARSON and A. J. HENNESSY,
Appellants,

vs.

A. W. HIGGINS, as Trustee in Bankruptcy of
LOUIS MORGAN, a Bankrupt,
Appellee.

Transcript of Record.

Upon Appeal from the United States District Court for the
Northern District of California, Southern Division.

INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

	Page
Appeal and Order Allowing Appeal.....	40
Assignment of Errors	41
Bond on Appeal	46
Certificate of Clerk U. S. District Court to Transcript on Appeal.....	48
Citation on Appeal.....	49
Complaint in Action to Recover Possession of Personal Property	8
Minutes of Court—November 19, 1928—Order Submitting Petition for Review, etc.....	39
Minutes of Court—January 9, 1929—Order De- nying Petition for Review, etc.....	39
Names and Addresses of Attorneys of Record..	1
Opinion and Order of Referee on Plea to Juris- diction Taken by Respondents.....	17
Order Denying Petition for Review, etc.....	39
Order Submitting Petition for Review, etc.....	39
Order to Show Cause	5

	Page
Index.	
Petition for Order to Show Cause.....	2
Petition for Review of Order and Proceedings of Referee	22
Plea to the Jurisdiction	7
Referee's Certificate on Petition for Review...	29
Supersedeas Bond	51

NAMES AND ADDRESSES OF ATTORNEYS
OF RECORD.

For Appellants:

A. J. HENNESSY, Esq., and GEORGE D.
COLLINS, Jr., Esq., 506 Claus Spreckels
Bldg., S. F., Cal.

For Appellee:

TORREGANO & STARK, Esqs., Mills Bldg.,
San Francisco, Calif.



District Court of the United States, Northern Dis-
trict of California, Northern Division.

CLERK'S OFFICE.—No. 17,170.

In re LOUIS MORGAN, in Bankruptcy.

To the Clerk of Said Court:

Sir: Please issue duly authenticated transcript of record on the appeal herein of Arvid Pearson and Alfred J. Hennessy, of the following, together with all endorsements thereon, viz:

1. Petition of A. W. Higgins, trustee in bankruptcy, filed with referee for order directing delivery of boat "Saxon."
2. Order to show cause of referee.
3. Plea to jurisdiction as filed with referee.
4. Certificate that no answer filed to plea to jurisdiction.

5. Order of referee directing delivery of boat.
6. Petition for review of order of referee.
7. Certificate that no answer filed by trustee in bankruptcy to petition for review.
8. Report of referee.
9. Order of District Court, submitting petition for decision.
10. Order and decree of District Court denying petition.
11. Appeal, assignment of errors, allowance of appeal and bond on appeal, also citation.

GEO. D. COLLINS, Jr.,

Attorney for Appellant,

506 Claus Spreckels Bldg., San Francisco.

[Endorsed]: Filed at 3 o'clock and 50 min., P. M.,
Mar. 11, 1929. [1*]

[Title of Court and Cause.]

PETITION FOR ORDER TO SHOW CAUSE.

To Hon. A. B. KREFT, Referee in Bankruptcy:

The petition of A. W. Higgins respectfully shows:

That he is the duly elected, appointed, qualified and acting trustee in bankruptcy of the estate of Louis Morgan, a bankrupt.

That on to wit: the 21st day of September, 1928, an action in claim and delivery was begun in the Superior Court of the State of California, in and for the city and county of San Francisco, entitled,

*Page-number appearing at the foot of page of original certified Transcript of Record.

Arvid Pearson, Plaintiff, vs. Louis Morgan, John Doe and Richard Roe, Defendants, and being numbered 199620 amongst the records and files of said Superior Court.

That at the time of filing the action, as aforesaid, the affidavit of Arvid Pearson, the plaintiff was filed, alleging amongst other things that he was entitled to the immediate possession of a certain boat named the "Saxon," and alleging that said boat was in the possession of Louis Morgan, one of the defendants in the action as aforesaid, and alleging further that the said Louis Morgan had held the possession of said boat from said Arvid Pearson wrongfully, and that the said Arvid Pearson was entitled to the delivery and immediate possession of said boat. [2]

That pursuant to the prayer of the action in claim and delivery and the affidavit of the plaintiff filed in said proceedings, the said boat "Saxon" was seized by the sheriff of the City and County of San Francisco and delivered over to the said Arvid Pearson, the plaintiff in said action, and ever since then said boat has been and is now in the possession of Arvid Pearson, his agents and/or attorneys.

That the petition in bankruptcy was filed by the said Louis Morgan on the 19th day of June, 1928, and the order of adjudication pursuant to said petition was duly made and filed on the 19th day of June, 1928, and said action in claim and delivery was filed in the Superior Court of the State of California on the 24th day of September, 1928;

That on the 19th day of June, 1928, the said boat "Saxon" was in the possession of said Louis Morgan, the bankrupt herein, as sole owner.

That upon the filing of the petition in bankruptcy as aforesaid, all of the property of the said Louis Morgan came into the custody of the United States District Court, and into the custody of Hon A. B. Kreft, as Referee in Bankruptcy to whom said proceedings were referred, and upon the election and qualification of your petitioner as Trustee herein he became entitled to the immediate possession of said boat "Saxon."

That it is necessary in the preservation of your petitioner's rights as Trustee herein and in the preservation of the rights of the general unsecured creditors herein, that the order to show cause hereinafter prayed for issue.

That Arvid Pearson, the plaintiff in said replevin action, is without the jurisdiction of this Court.

That A. J. Hennessy is the attorney in fact and the attorney at law representing the said Arvid Pearson. [3]

WHEREFORE, your petitioner prays that an order to show cause be issued by the above-entitled court directed to Arvid Pearson and A. J. Hennessy, to show cause, if any they have, why the said boat "Saxon" should not be immediately turned over and delivered to A. W. Higgins, as Trustee in Bankruptcy for Louis Morgan; and for such fur-

ther and other order as may be just and proper in the premises.

A. W. HIGGINS,
Petitioner.

ERNEST J. TORREGANO,
CHARLES M. STARK,
Attorneys for Petitioner.

Northern District of California,
City and County of San Francisco,—ss.

A. W. Higgins, being first duly sworn, deposes and says:

That he is the petitioner named in the foregoing petition; that he has read same, and that the statements therein contained are true, according to the best of his knowledge, information and belief.

A. W. HIGGINS.

Subscribed and sworn to before me this 22d day of October, 1928.

[Seal] LOUIS WIENER,
Notary Public in and for the City and County of
San Francisco, State of California.

[Endorsed]: Filed Oct. 24, 1928. [4]

[Title of Court and Cause.]

ORDER TO SHOW CAUSE.

Upon the reading, filing and consideration of the verified petition of A. W. Higgins, trustee herein, praying for an order to show cause directed

to Arvid Pearson and A. J. Hennessy, to show cause, if any they have, why the boat "Saxon" described in the trustee's petition, should not be delivered over and possession thereof given to A. W. Higgins, Trustee in Bankruptcy in the above-entitled matter;

IT APPEARING to be a proper case for this order, and the Court being fully advised in the premises, and

IT IS ORDERED that Arvid Pearson and/or A. J. Hennessy show cause, if any they have, before me on the 27th day of October, 1928, at 10 o'clock A. M. why the said Arvid Pearson and/or A. J. Hennessy should not immediately turn over and deliver to the said A. W. Higgins, trustee herein, the possession of the boat "Saxon."

IT IS FURTHER ORDERED that a copy of the trustee's petition and a copy of this order be delivered to Arvid Pearson and/or A. J. Hennessy at least two days before the return date of this order.

Done in open court this 24th day of October, 1928.

A. B. KREFT,

Referee in Bankruptcy.

[Endorsed]: Filed Oct. 24, 1928, at 3 o'clock and 20 min. P. M.

A. B. KREFT,

Referee in Bankruptcy. [5]

[Title of Court and Cause.]

PLEA TO THE JURISDICTION.

I.

Come now Arvid Pearson and A. J. Hennessy and specially appearing only for the purpose of interposing this plea to the jurisdiction of said United States District Court and to the jurisdiction of the Hon. A. B. Kreft, referee in bankruptcy herein, allege that said Court and Referee have no jurisdiction concerning the matters pleaded in the petition of A. W. Higgins "trustee," for an order to show cause directed to said Pearson and Hennessy, why the possession of the boat "Saxon" should not by them be turned over and delivered to said Higgins as trustee in bankruptcy for the estate of said Louis Morgan, and no jurisdiction over the person of said Pearson respecting said petition filed herein or respecting the order to show cause issued thereon by the said Hon. A. B. Kreft, referee in bankruptcy and dated the 24th day of October, 1928. And in support of said objections to the jurisdiction of said Court and to the jurisdiction of said Referee, the said Arvid Pearson and the said A. J. Hennessy aver as follows:

That prior to the alleged appointment of said A. W. Higgins as trustee in bankruptcy of the estate of said Louis Morgan, a bankrupt, there was commenced by said Arvid Pearson as plaintiff, an action in claim and delivery in the Superior Court of the State of California and in and for the [6]

city and county of San Francisco, against the said Morgan as defendant to recover the possession of said boat "Saxon." That said action is numbered 199,620 in said Superior Court. That the following is a true and correct copy of the complaint on file in said action, viz.:

In the Superior Court of the State of California in
and for the City and County of San Francisco.

No. 199,620—Dept. —

ARVID PEARSON,

Plaintiff,

vs.

LOUIS MORGAN, JOHN DOE and RICHARD
ROE,

Defendants.

COMPLAINT IN ACTION TO RECOVER POS-
SESSION OF PERSONAL PROPERTY.

The plaintiff in the above-entitled action complains of the defendants therein and for cause of action alleges:

I.

That, heretofore, to wit: on the 19th day of August, 1927, the plaintiff and defendant Morgan entered into and executed a certain contract in writing whereby they became copartners in a certain boat then and there, and ever since and now situated in the said city and county of San Francisco, State of California. That said boat is of twenty-

one tons burden and designated the "Saxon" and is forty-two feet in length and twelve feet beam and of the value of one thousand and five hundred and no/100 dollars (\$1,500.00). That said copartnership in said boat continued in existence until the said defendant Morgan, individually, was by the Southern Division of the United States District Court, in and for the Northern District of California, and by its order, judgment and decree, duly given and made on the 19th day of June, 1928, [7] and upon the voluntary petition filed in that court by said Morgan, adjudged a bankrupt. That said adjudication still remains in full force and effect and has never been vacated or set aside. That said bankruptcy proceedings are still pending in the said United States District Court. That plaintiff is not a party petitioner in said bankruptcy proceedings and has not been adjudged a bankrupt nor has said partnership been adjudged bankrupt nor is said partnership a petitioner in said proceedings in bankruptcy. That plaintiff does not consent to the said partnership property being administered in said bankruptcy, and claims the right to the possession of said property as said copartner and the right to settle the partnership business as provided in section five of the Bankruptcy Law of 1898.

II.

That the said boat is in the possession of defendants and they refuse to deliver the same to plaintiff. That plaintiff is entitled to the possession of said boat. That said defendants withhold and de-

tain the possession of said boat from plaintiff, against his will and without his consent. That said boat has not been taken for a tax, assessment or fine pursuant to a statute, nor seized under an execution or an attachment against the property of plaintiff.

III.

That plaintiff is ignorant of the names of defendants John Doe and Richard Roe and requests leave to insert herein their true names when discovered.

IV.

WHEREFORE, plaintiff prays judgment against said defendants for the possession of said boat or the sum of one thousand five hundred and no/100 dollars (\$1,500.00), the [8] value thereof, in case delivery cannot be had and for costs of suit.

ALFRED J. HENNESSY,

Attorney for Plaintiff.

That in said action the plaintiff therein furnished the sheriff of the said city and county of San Francisco at the time of issuance of the summons in said action and before answer served or filed in said action, the claim of plaintiff to the delivery of said boat "Saxon" to him the said plaintiff, by affidavit stating that the plaintiff is entitled to the possession of said boat, describing it as in said complaint stated; that said boat is wrongfully detained by the defendant from the plaintiff, that the alleged cause of such detention according to his best knowledge, information and belief is an unfounded

claim by said defendant that he is the sole owner of said boat, and that said boat has not been taken for a tax, assessment, or fine pursuant to a statute, nor seized under execution or attachment against the property of the plaintiff; and in said affidavit also stated the actual value of said boat as required by the provisions of section five hundred and eleven of the Code of Civil Procedure of the State of California. That thereupon the plaintiff's attorney in said action by an endorsement in writing on said affidavit required the sheriff of said city and county of San Francisco, the same being the county wherein said boat was then and there situated and claimed to be situated, to take said boat from the possession of said defendant Morgan, and the plaintiff then and there furnished a written undertaking executed by two sufficient sureties, approved by the sheriff, to the effect that they are bound to the defendant in double [9] the value of said boat as stated in said affidavit, for the prosecution of said action, for the return of the property to the defendant if return thereof be adjudged and for the payment to him of such sum as may from any cause be recovered against the plaintiff. That plaintiff delivered said undertaking and said affidavit with said notice, to wit: said endorsement thereon, to the said sheriff and thereupon said sheriff did take said boat into his official custody and did retain the same in such custody for more than five days prior to the delivery of said boat to the plaintiff and did without delay serve on said defendant a copy of said affi-

davit and said endorsement or notice thereon and of said undertaking by delivering the same together with a copy of said complaint and summons to said defendant personally. That no exception was taken by defendant to the sufficiency of the sureties on said undertaking, nor did said defendant give the sheriff a written undertaking for the return of the said boat to the defendant, as provided in section five hundred and fourteen of the Code of Civil Procedure of said State of California. That at no time did said defendant claim or require the return of said boat to him by said sheriff. That after the expiration of five days from the said taking of said boat by said sheriff and after the expiration of five days from the service of said notice to the defendant, the said sheriff delivered said boat to the plaintiff, who has ever since and does now hold possession of said boat pending the trial and judgment of said Superior Court in said action. That no claim was made to said sheriff by any third person prior to said delivery of said boat to said plaintiff. [10]

II.

That the said boat ever since its said delivery by said sheriff to the plaintiff in said action of claim and delivery, has been and is now in the custody of the law of said State of California and in the custody of said Superior Court, and not in the custody of said plaintiff. That said plaintiff now holds said boat in said *custodia legis* to abide the judgment of said Superior Court in said action, and it has been so decided by the courts of Califor-

nia (*Bisconer vs. Billing*, 71 Cal. App. 779; *Riverside Portland Cement Co. vs. Taft*, 192 Cal. 643; *Hawi Mill & P. Co. vs. Leland*, 56 Cal. App. 224). That section 521 of the Code of Civil Procedure requires the said Superior Court to protect said plaintiff in the custody of said property "until the final determination of the action." That said action is still pending in said Superior Court and awaiting trial therein.

III.

That said Hennessy has never had and has not now the custody or possession of said boat and has no right or authority from said plaintiff to deliver said boat to said Higgins as trustee in bankruptcy of said Morgan's estate, and is unable to make said delivery were he required to do so. That no service of said petition of said Higgins or of said order to show cause issued thereon, has been made on said plaintiff Arvid Pearson and there is no jurisdiction in said United States District Court or in said referee of his person and no jurisdiction to proceed on said petition or order to show cause, against him. That said Pearson is temporarily absent from said State of California. [11]

IV.

That prior to the filing of said petition on which said order to show cause is based the said Higgins as said trustee applied to said Superior Court for leave to file in said action of claim and delivery, his complaint in intervention. That said leave so applied for by said Higgins was granted him by said Superior Court and he thereupon and prior to the

filing of his said petition herein did file in said action and did serve on the plaintiff, a complaint in intervention as said trustee in which he alleges that said Morgan is the sole owner of said boat. That to said complaint in intervention the said plaintiff Arvid Pearson has filed in said action and served on said intervener an answer putting in issue said allegation of ownership and all other material allegations of said complaint in intervention. That said Higgins as such trustee has submitted himself to the jurisdiction of said Superior Court in said action by obtaining leave to file and by filing therein the said complaint in intervention and for that reason is estopped and precluded from litigating in any other *forum* the issues involved in said action of claim and delivery. That said Higgins as said trustee has never applied to said Superior Court for an order giving him possession of said boat.

V.

That said United States District Court and said referee have no jurisdiction of the matters presented in said petition of said Higgins as trustee, to wit: the said petition on which said order to show cause is based herein, in that at the time of the filing of said Morgan's voluntary petition in bankruptcy for himself individually only and long prior to the filing of said petition the said boat constituted a part of the assets of the partnership existing between him and the [12] said Arvid Pearson and for that reason the said United States District Court and said referee have no jurisdic-

tion in said bankruptcy proceedings over the said boat. That said Pearson is not insolvent and has never been adjudged a bankrupt, nor has said partnership ever been adjudged a bankrupt. That said boat prior to the filing of said voluntary petition of said Morgan in bankruptcy and at the time he was by said United States District Court adjudged a bankrupt thereon the said boat was partnership property of said Pearson and said Morgan and on that ground said Pearson is entitled to the possession of said boat as against said Higgins as trustee in bankruptcy of the estate of said Morgan. That said Pearson has not consented and does not consent to said boat being administered in said bankruptcy proceedings. That said Pearson claims the right to the possession of said boat as being part of said partnership property and makes said claim adversely to said Higgins as trustee of the estate of said bankrupt.

That said referee has no jurisdiction of said petition of said Higgins, on which said order to show cause was issued by said referee, by reason of the facts herein stated and for the further reason that at the time of the filing of said petition and ever since then the Judges of said United States District Court were not and have not been absent from the said division of said judicial district or sick or unable to act and the Clerk of the said United States District Court has not issued a certificate showing any such absence or sickness or inability to act, as required by subdivision 3 of

section 38 of the Bankruptcy Law of 1898 as amended. [13]

VI.

WHEREFORE the said respondents Arvid Pearson and A. J. Hennessy pray that said order to show cause be discharged and said petition on which the same is based be ordered dismissed for want of the necessary jurisdiction of the same by said United States District Court and by said Referee and also for want of the necessary jurisdiction of the person of said Pearson.

ALFRED J. HENNESSY,

In Pro Per.

ALFRED J. HENNESSY,

Attorney for Said Pearson for the Special Appearance Herein Made in His Behalf.

State of California,

City and County of San Francisco,—ss.

A. J. Hennessy being duly sworn deposes and says that he is one of the respondents herein; that he has read the foregoing plea to the jurisdiction and knows the contents thereof; that the same is true of his own knowledge except as to the matters therein stated on his information or belief; that as to those matters he believes it to be true.

ALFRED J. HENNESSY.

that the boat is in the possession of Mr. Hennessy, acting as attorney for Mr. Pearson, as the result of a bond given in the claim and delivery proceeding instituted by Mr. Hennessy on behalf of Mr. Pearson, and that, therefore, the boat is not at the present time in the possession of either the state court or an officer of the state court. It further appears that the custody over the boat by the sheriff on execution proceedings on judgment obtained by one Pulin was released. The effect of such release was to restore possession of the boat to the bankrupt from whose possession it was taken by the sheriff. By the sheriff's release the boat came constructively within the custody of the Bankruptcy Court. The bankrupt has testified that up to the time of the claim and delivery action he was in actual possession of the boat. Subsequent to the release by the sheriff Mr. Hennessy commenced a proceeding in the state court under a writ to compel the sheriff to proceed with the sale under execution, which writ, under Mr. Hennessy's statement has been discharged, without prejudice. The Referee is of the opinion that the boat on the discharge of such writ at once came into the constructive possession of this Court, and whether or not the bankrupt obtained the actual custody on the discharge of the writ is immaterial. It is true, as you contend, Mr. Hennessy, that [16] this Court is without jurisdiction to administer upon this boat if the boat is partnership property; but as the boat is in the custody of this Court it has jurisdiction

to determine whether or not that boat is partnership property. The trustee, however, contends that the boat is not partnership property, but is the individual property of this bankrupt. It was not stated in the stipulation, but it has been brought out in the previous hearing, of which the Referee will take judicial notice, that Mr. Pearson is not within the jurisdiction of this court, and that the claim and delivery action brought on behalf of Mr. Pearson on the ground that the boat was partnership property was brought by Mr. Hennessy, as attorney for Mr. Pearson. Is that not correct, Mr. Hennessy?

Mr. HENNESSY—Yes.

The REFEREE.—(Contg.) The jurisdiction of the bankruptcy court of property, after the filing of the petition in bankruptcy is exclusive, where the property at the time of the filing of the petition was in the possession of the bankrupt, physically or constructively.

Mr. HENNESSY.—When a complaint is filed setting out that party is a partner in the property, it brings it out of the jurisdiction; but he has not submitted himself to the jurisdiction of the bankruptcy court, and the partner has not filed any petition in bankruptcy, it takes it out of the jurisdiction of this court.

The REFEREE.—On that point the Referee rules against you. But the claim that you are making in the state court that this property is partnership property, you are entitled to make in this

court. And the order of the Referee will be without prejudice to your right to set up and try out the question of partnership ownership in this court. This Court alone can determine to whom this boat belongs. [17]

Mr. STARK.—Will your Honor issue a restraining order prohibiting the disposition of the boat pending the Marshal taking the boat into his possession?

The REFEREE.—I think a restraining order is unnecessary.

Mr. HENNESSY.—I want time to answer the Higgins' petition. I will take an exception to the ruling of the Court, and ask leave to file a review of the Court's order. I want to get a stay of proceeding in this matter.

Mr. STARK.—At the same time I want the costs taxed.

Mr. HENNESSY.—I will ask for a five days' stay in this matter to file a petition of review, under Rule 9.

The REFEREE.—Your petition for review must be filed with the Referee.

Mr. STARK.—Pending all this, we do not want the administration of this estate delayed.

Mr. HENNESSY.—I will ask for a five days' stay. My reason is to give me time to file a review of the Court's order.

Mr. STARK.—At the same time, are you raising the question of the possession of the boat when it is in the possession of the Court?

Mr. HENNESSY.—We hope to get a stay of the Court's order. There is a question of law to be decided. I ask for five days' stay.

Mr. STARK.—It has come to our attention there was \$450 worth of property moved off that boat.

Mr. HENNESSY.—I do not doubt that has come to Mr. Stark's attention. It is a question of fact whether it has, or not.

The REFEREE.—I will grant you five days' stay. [18]

Mr. STARK.—It is understood that no attempt to move the boat or change its position will be made: Is that correct?

Mr. HENNESSY.—I am not making any stipulation. I will comply with the law.

The REFEREE.—In the making of this order overruling the plea to the jurisdiction, the Referee goes further and holds that the trustee is entitled to the possession of the boat, and the order is that the boat be delivered to the trustee. Under this order of delivery, however, I will grant you a stay of five days.

So ordered.

[Endorsed]: Filed at 4 o'clock and 15 min. P. M.,
Nov. 1, 1928. [19]

[Title of Court and Cause.]

PETITION FOR REVIEW OF ORDER AND
PROCEEDINGS OF REFEREE.

To the Honorable, the Judges of the Southern
Division of the United States District Court,
Northern District of California:

This, the petition of Arvid Pearson and A. J. Hennessy, respectfully shows: That in accordance with Rule 16 of said court they specially appear herein for the sole purpose of objecting to the jurisdiction of said court and its Referee, as more particularly hereinafter specified. That on the 27th day of October, 1928, A. B. Kreft, Esq., Referee in Bankruptcy, made, filed and entered in the above-entitled matter and in summary proceedings before him pending, a certain order that the boat "Saxon" be delivered by said Pearson and Hennessy to A. W. Higgins, as Trustee in Bankruptcy of said Louis Morgan and as part of the bankrupt's estate. That said order has not been vacated or set aside, nor complied with. That said order is void and in excess of the jurisdiction of said United States Court and of said referee in the particulars specified and set forth in the plea to the jurisdiction, interposed and filed herein by said Pearson and Hennessy with said referee on the 27th day of October, 1928, in said summary proceedings and in their points and authorities supporting the said plea and filed in said matter on said [20] 27th day of October, 1928, with the said

Referee at the hearing of the petition of said Higgins as such trustee and on the order to show cause issued by said Referee and dated October 24th, 1928, directed to said Pearson and Hennessy and on file herein, upon the basis of which petition and order to show cause the said order of October 27th, 1928, for the delivery of said boat to said trustee in bankruptcy as part of the estate of said bankrupt was made by said referee. That neither said court or Referee had jurisdiction to make said order of October 27th, 1928 for said delivery of possession of said boat to said trustee, in that: (1) No service of said order to show cause was made on said Pearson. (2) That the claim of said Pearson to the boat referred to in said order of October 27th, 1928, is adverse to the trustee in bankruptcy of the estate of said Louis Morgan and was not shown in said proceedings before said referee to be merely colorable or made fraudulently or without right or in bad faith. (3) That said boat is not and never has been part of the said estate in bankruptcy of said Morgan. (4) That at the time of the making of said order of October 27th, 1928, the said boat was and is now in *custodian legis* of the State of California, and of the Superior Court, of said state, to wit: the Superior Court in and for the city and county of San Francisco in an action there pending and wherein said Morgan, said Pearson and said trustee in bankruptcy are parties and have appeared as such. That said action and the issue presented therein, involve the right of said Pearson as solvent partner of said Morgan

to the possession and the ownership of said boat, as partnership property, the said action being No. 199,620 in said Superior Court, and now at issue therein. (5) That no application was [21] ever made by said trustee in bankruptcy to said Superior Court for the possession of said boat. (6) That said boat is in possession of said Pearson and in said *custodia legis* and never has been and is not in the possession of said Hennessy. That said Pearson's possession of said boat is as solvent partner of said Morgan, said boat being property of the partnership of said Morgan and Pearson, said partnership existing prior to and at the time said Morgan filed herein his voluntary petition in bankruptcy and prior to and at the time he was adjudged a bankrupt herein by said United States District Court. That section 5 of the Bankruptcy Law deprives said court and said Referee of all jurisdiction over said boat in said bankruptcy proceedings by giving said Pearson as said solvent partner the right to the possession of said boat as against said trustee in bankruptcy. That said Pearson has always refused and still refuses to consent to the property of said partnership being administered in said bankruptcy case of Louis Morgan. (7) That said court and Referee have no jurisdiction or authority in summary proceeding to pass upon or determine on its merits the said adverse claim of said Pearson to the exclusive possession of said boat as partnership property. (8) That the Bankruptcy Law denies to said court and Referee the authority and jurisdiction to take possession of said

boat from said Pearson as said partner. (9) That the Bankruptcy Law denies the said trustee in bankruptcy all right to the possession of said boat. (10) That said Referee in overruling and in deciding at variance and in conflict with and against said plea to the jurisdiction filed with him herein on the 27th day of October, 1928, did so in violation of law. (11) That the petition of the trustee in bankruptcy, filed with said Referee herein on the 24th day of October, 1928, and upon which said order to show cause of that date and said order of October 27th, 1928, [22] are based, is insufficient in law to justify or sustain summary proceedings before said United States District Court or before said Referee for the possession of said boat in the matter of the said bankruptcy of said Morgan. (12) That neither the said petition of said trustee nor any evidence before said Referee shows nor tends to show, that the said claim of said Pearson to the possession of said boat is merely colorable and not adverse to said trustee in bankruptcy. (13) That said Referee erred and decided contrary to and in violation of law in overruling each of the said and foregoing objections of these petitioners. (14) That the said Referee erred and decided contrary to and in violation of law and exceeded his jurisdiction in making said order of October 27th, 1928. (15) That said Referee erred in overruling objections to evidence introduced by said trustee herein. (16) That said Referee erred and decided contrary to and in violation of law in ruling that the said plea to the ju-

risdiction, filed with him herein by said Pearson and Hennessy, is insufficient in law to constitute a bar to said summary proceedings and to said order of October 27th, 1928. That to each of said rulings of said Referee and to said order of October 27th, 1928, your petitioner then and there duly accepted. That your petitioners present in support of this petition, their points and authorities filed with said Referee on the 27th day of October, 1928, in the matter of said summary proceedings.

That heretofore, to wit: On the 19th day of August, 1927, the said Louis Morgan and said Arvid Pearson by instrument in writing signed, executed and delivered by them, entered into partnership and became copartners in said boat "Saxon" and in the business of owning, managing and operating said boat. That said copartnership continued in existence [23] until dissolved by legal effect of said adjudication in bankruptcy against said Morgan individually, to wit: on the 19th day of June, 1928. That said boat was not in possession of said Morgan at the time of his said adjudication in bankruptcy, nor at the time of the filing of his petition in bankruptcy, nor was said boat at any time in the possession of said court or said trustee or said Referee. That ever since the said 19th day of August, 1927, the said boat has been and is the property and an asset of said partnership, and in the possession of said partnership until delivered by process of law into the custody of said Pearson as solvent partner of said Morgan and as property of said partnership. That said A. J. Hennessy is

not and never has been the attorney in fact of said Arvid Pearson and has never held and does not hold possession of said boat for said Pearson or at all.

WHEREFORE, the said Arvid Pearson and said A. J. Hennessy pray that said summary proceedings before said Referee and said order of said Referee of October 27th, 1928, be by the said United States District Court adjudged *coram non judice* and in excess of the jurisdiction of said Referee and void. That said summary proceedings and said order of October 27th, 1928, be accordingly by the Court vacated, set aside and annulled. That these petitioners be granted such other, further or difference relief as may be just and in conformity with law, together with costs.

Dated at San Francisco, California, this the 30th day of October, 1928.

ALFRED J. HENNESSY,
Petitioner *in Pro Per.*

ALFRED J. HENNESSY,
Attorney for Petitioner Arvid Pearson by Special
Appearance. [24]

United States of America,
Northern District of California,
City and County of San Francisco,—ss.

A. J. Hennessy, being duly sworn, deposes and says: That he is one of the petitioners herein; that he has read the foregoing petition and knows the contents thereof; that the same is true of his own knowledge except as to the matters therein stated

on his information or belief; that as to those matters he believes it to be true.

ALFRED J. HENNESSY.

Subscribed and sworn to before me this 30th day of October, 1928.

[Seal]

EVELYN LA FARGILL,

Notary Public in and for the City and County of San Francisco, State of California.

CERTIFICATE OF COUNSEL.

It is hereby certified that in my judgment the foregoing petition is well founded in law and in fact. I do further certify that said petition is not interposed for delay.

Dated at San Francisco this 30th day of October, 1928.

ALFRED J. HENNESSY,

Counsel for Petitioners. [25]

[Endorsed]: Receipt of a copy of the within petition for review of order and proceedings of Referee is hereby admitted this 30th day of October, 1928.

TORREGANO & STARK,

B.

Attorney for Trustee in Bankruptcy.

Filed Oct. 30, 1928, at 11 o'clock and 40 min. A. M. [26]

[Title of Court and Cause.]

REFEREE'S CERTIFICATE ON PETITION
FOR REVIEW.

To the Honorable the Judges of the Southern Division of the United States District Court, for the Northern District of California, Second Division:

The undersigned Referee in Bankruptcy, to whom was referred the above-entitled matter, respectfully certifies and reports:

That on October 27th, 1928, Arvid Pearson and A. J. Hennessy, filed with the Referee a plea to the jurisdiction of the Referee to entertain a petition of A. W. Higgins, trustee herein, for an order requiring the delivery to the trustee of a boat named "Saxon," claimed by the trustee to be property of the estate, said Pearson and Hennessy appearing especially to object to the jurisdiction on the 27th day of October, 1928. The Referee made an order denying said plea to the jurisdiction. Said Pearson and Hennessy feeling aggrieved by reason of said order, filed herein on October 30th, 1928, their petition for review. The testimony in the proceedings was reported but has not been transcribed excepting the portion containing the Referee's order, which transcript of the Referee's order is transmitted herewith. [27]

The material facts I find to be as follows:

In his schedules the bankrupt schedules "interest in ship 'Saxon' located at Schultz's shipyard, 1138

Evans Avenue (San Francisco) \$6,000." The construction of the vessel has not been completed. On the 8th day of September, 1924, one Joseph Pulin obtained a judgment against the bankrupt in the sum of \$1,700 and on the 13th day of June, 1928, he procured a writ of execution out of the Superior Court of San Francisco, and the Sheriff levied upon said vessel. Louis Morgan filed his voluntary petition in bankruptcy on June 19th, 1928, and an adjudication was had the same day. The bankrupt immediately informed the Sheriff of the adjudication in bankruptcy, whereupon the Sheriff released the execution levied and returned the execution endorsed released. No custodian or receiver was appointed by this Court. The trustee, A. W. Higgins, was elected on the 25th day of September, 1928, and qualified on the 26th day of September, 1928. On the 11th day of September, 1928, Joseph Pulin in the action in the state court filed his affidavit praying that a writ of *venditioni exponas* issue out of said state court for the purpose of requiring the sheriff to proceed with the sale on execution. On September 27th, the trustee filed with the Referee a petition for an order authorizing him to intervene in said state court action of Pulin vs. Morgan, which petition was granted. The trustee appeared in the state court proceedings and filed a copy of the Referee's order. Mr. A. J. Hennessy is attorney for Pulin. Following the proceedings to require the sheriff to proceed with the execution, to wit, on the 24th day of September, 1928, said A. J. Hennessy on behalf of said Arvid

Pearson commenced a proceeding in said Superior Court against Louis Morgan, the bankrupt, and others in claim and delivery, asserting that [28] said vessel is the partnership property of a co-partnership composed of said Arvid Pearson and Louis Morgan (the bankrupt). Said Pearson at the time of the commencement of said claim and delivery action was not within the State of California, and up to the time of the hearing before the Referee has not been personally within this jurisdiction. The proceeding was commenced in the name of Pearson by said A. J. Hennessy. Upon the filing of the necessary bond at the instance of said A. J. Hennessy, the vessel came into the possession and under the control of said A. J. Hennessy, acting for said Arvid Pearson. On October 4th, 1928, the trustee, A. W. Higgins, filed with the Referee a petition to intervene in the claim and delivery proceeding in the state court, which was granted, and the trustee thereafter appeared in said proceeding. Thereafter the proceedings pursuant to the affidavit and prayer for a writ of *venditioni exponas* was, at the instance of A. J. Hennessy, the affiant in the affidavit praying for said writ, dismissed by the said state court without prejudice. No ruling has been made by the state court in the claim and delivery proceeding. Following the dismissal the affidavit for said writ of *venditioni exponas* and the intervention of the trustee in the claim and delivery proceeding, the trustee filed a petition with the Referee for an order against said Pearson and Hennessy to show cause,

if any they have, why the boat "Saxon" should not be delivered over and the possession thereof given to A. W. Higgins, trustee herein. Upon the return day of such order to show cause, said A. J. Hennessy as attorney for Arvid Pearson, and appearing for himself personally, entered a special appearance and filed a plea to the Referee's jurisdiction to make the order prayed for by the trustee. Upon the hearing [29] of such plea, the bankrupt was sworn and examined, and testified that from the time of the release of the levy on execution by the sheriff in the case of Pulin vs. Morgan he was in possession of said vessel until the possession was taken from him in the claim and delivery action aforesaid.

The Referee held that upon the release of the vessel by the sheriff in the execution proceedings in the case of Pulin vs. Morgan the vessel at once came into the custody of this Court and was in the custody of this Court at the time of the commencement of the claim and delivery action. The plea to the jurisdiction was overruled and an order was made requiring said A. J. Hennessy to deliver possession of said boat to the trustee.

In their petition for review Pearson and Hennessy state that the "Referee in Bankruptcy, made, filed and entered in the above-entitled matter and in summary proceedings before him pending, a certain order that the boat 'Saxon' be delivered by said Pearson and Hennessy to A. W. Higgins as trustee in Bankruptcy of said Louis Morgan and as part

of the bankrupt's estate. (Underscoring mine.)”

The underscored portion of the statement is not correct. The Referee has not decided that the boat is “part of the bankrupt's estate.” On the contrary, the Referee stated (Pg. 3 of the Transcript) that if it should be made to appear that the boat is partnership property that the Bankruptcy Court was without jurisdiction to administer upon the boat as an asset in this state. The trustee, however, contends that the boat is not partnership property, but is the individual property of the bankrupt, and at page 4 of the transcript transmitted herewith the Referee stated that his order was “without prejudice to your right (referring to said Pearson and Hennessy) to set up and try [30] out the question of partnership ownership in this Court.” The ruling of the Referee goes no further than to hold that the boat on the release of execution came into the possession of this Court and this Court cannot surrender its jurisdiction to determine the ownership of said property.

At the commencement of this proceeding the status of this boat and the facts concerning the same were not clearly developed before the Referee and he was of the opinion that as a matter of comity the trustee should make his appearance in the state court upon the execution proceedings and later upon the claim and delivery proceeding. Such appearance by the trustee in the state court, however, does not divest the Bankruptcy Court of its paramount jurisdiction. The Referee upon subsequent pro-

ceedings reached the conclusion that such paramount jurisdiction should be exercised. A case decided by the U. S. Circuit Court of Appeals of the 6th Circuit on June 18th, 1928, found in American Bankruptcy Reports, Advance Sheets, Volume 12, No. 3, October, 1928, is directly in point. I quote from the syllabi as follows:

“The fact that a trustee in bankruptcy, in deference to a state court, appears therein and asks that a state court receiver be directed to turn over property of bankrupt to him does not render the decision of the state court *res judicata* as to the right to the property and thereby deprive the bankruptcy court of power to order, in summary proceedings, the state receiver to turn the property over to the receiver in bankruptcy.”

The Referee's reasons for authorizing the trustee to appear in the matter of Pulin vs. Morgan upon the obtaining of the writ of *venditioni exponas* was that it was not clear to him that the effect of such writ might not be to continue [31] the jurisdiction of the state court over the vessel, the state court having acquired possession of the vessel upon Pulin's execution. Now, it appears that such writ has been discharged and the only ground upon which Pearson and Hennessy claim that the boat is in the custody of the state court is by virtue of the claim and delivery action. This action, however, was not commenced until September 24th, 1928, about three months after the commencement of this bankruptcy proceeding and at

that time the Referee finds the boat was in the possession of the bankrupt, and therefore, within the custody of this Court. The possession of the bankrupt becomes the possession of the Court. See Collier on Bankruptcy, page 783, and cases cited therein. The rule goes further, quoting from Collier, page 779.

“The rule which gives the bankruptcy court exclusive jurisdiction to determine claims to property in its custody is not limited to actual possession, but extends to constructive possession as well, including property held not only by but for the bankrupt.”

See, also, Matter of Diamond's Estate, 44 A. B. R. 268 and case of Orinoco Iron Co. vs. Metzel, 36 A. B. R. 247. Quoting from the syllabi thereof

“The exclusive jurisdiction of the bankruptcy court over the general administration of the bankrupt's estate carries with it exclusive authority to determine not only the claims of creditors, but also adverse claims, whether by way of ownership or paramount liens.” [32]

and also holding that constructive possession is sufficient.

The claim and delivery proceeding was a proceeding improperly commenced, and being commenced after the filing of the petition in bankruptcy will be considered of no force and effect. In the U. S. Supreme Court case of White vs. Schloerb, 4 A. B. R. 178, it was held:

“Where goods so held in the custody of the District Court have been seized upon a writ of replevin from a state court, the District Court sitting in bankruptcy has jurisdiction by summary proceedings to compel the return of the property seized.”

The petition for review assigns as error the fact that the trustee's petition for order to show cause was not served upon Arvid Pearson. Service on Pearson was not required. Service upon the person having the custody or control of the boat alone was necessary, and that person is Mr. A. J. Hennessy. Mr. Pearson is without the jurisdiction and the claim and delivery proceeding is a proceeding by A. J. Hennessy in Pearson's name. The proceeding taken by Mr. Hennessy in the state court has caused much delay and necessarily some expense to the estate. Mr. Hennessy, immediately upon the release of the execution, should have applied to this court on behalf of Mr. Pearson for possession of the boat under his asserted claim that the boat is partnership property, and therefore not subject to administration in this proceeding. The Referee's order leaves open to him such a proceeding.

Mr. Hennessy cites a number of cases upon the point that an adverse claimant is entitled to have his claim determined by plenary suit. This question is not involved here, [33] as such right to plenary suit exists only where the adverse claimant was in possession before the bankruptcy and remains in possession. The only possession on which

it is claimed the state holds jurisdiction is a possession obtained when the boat was taken from the bankrupt in the claim and delivery proceeding after the commencement of the bankruptcy proceeding, and as stated above, wrongfully taken while the boat was in the custody of this Court.

I deem it unnecessary to comment upon the various assignments of error which are concerned in the main with the jurisdiction of the court over copartnership property. Concededly the Court cannot administer upon partnership property once it is established that the property in the custody of the Court is a partnership and not an individual asset. The sole issue in the matter is—did the vessel come into the custody of this court upon the release by the sheriff of the execution in the case of Pulin vs. Morgan. In my opinion, said release placed the property in the custody of this Court and that it was wrongfully taken therefrom in said claim and delivery proceeding and that any person claiming said property must apply to this Court, which cannot surrender its exclusive jurisdiction acquired by such custody.

Dated: November 1, 1928.

Respectfully submitted,

A. B. KREFT,

Referee in Bankruptcy. [34]

Papers transmitted:

1. Partial transcript of proceedings containing opinion and order of Referee.
2. Plea to jurisdiction on behalf of Arvid Pearson and A. J. Hennessy.

3. Points and authorities in support of said plea.
4. Petition for review of order and proceedings of Referee.
5. Praceipe accompanying petition for review.
6. Petition of trustee to intervene in action of Pulin vs. Morgan.
7. Order to intervene in action of Pulin vs. Morgan.
8. Petition of trustee to intervene in action of Pearson vs. Morgan.
9. Order to intervene in action of Pearson vs. Morgan.
10. Petition of trustee for order to show cause and order to show cause, the subject of review.

[Endorsed]: Filed at 4 o'clock and 15 Min. P. M.
Nov. 1, 1928. [35]

At a stated term of the Southern Division of the United States District Court for the Northern District of California, held at the courtroom thereof, in the city and county of San Francisco, on Monday, the 19th day of November, in the year of our Lord one thousand nine hundred and twenty-eight. Present: The Honorable HAROLD LOUDERBACK, Judge.

[Title of Cause.]

MINUTES OF COURT—NOVEMBER 19, 1928—
ORDER SUBMITTING PETITION FOR
REVIEW, ETC.

This matter came on regularly for hearing on (1) report of Referee on petition to review, etc.; (2) motion for order staying order of Referee; and (3) order to show cause why A. J. Hennessy should not be guilty of contempt. After argument by counsel for respective parties, the Court ORDERED said matter submitted on brief and affidavit to be filed in 3 days. [36]

At a stated term of the Southern Division of the United States District Court for the Northern District of California, held at the courtroom thereof, in the city and county of San Francisco, on Wednesday, the 9th day of January, in the year of our Lord one thousand nine hundred and twenty-nine. Present: The Honorable HAROLD LOUDERBACK, Judge.

[Title of Cause.]

MINUTES OF COURT—JANUARY 9, 1929—
ORDER DENYING PETITION FOR
REVIEW, ETC.

The Referee's certificate on petition for review, petition for review, and motion to adjudge in con-

tempt, heretofore argued and submitted, being now fully considered, IT IS ORDERED that the Referee's report be and the same is hereby confirmed; the petition for review be and the same is hereby denied; and the motion to adjudge in contempt be and the same is hereby denied. [37]

[Title of Court and Cause.]

APPEAL AND ORDER ALLOWING APPEAL.

The above-named Arvid Pearson and A. J. Hennessy, conceiving themselves aggrieved by the order and decree of the Southern Division of the United States District Court, Northern District of California, made and entered on the 9th day of January, 1929, in the above-entitled matter of Louis Morgan, a bankrupt, doth hereby appeal from said order and decree to the United States Circuit Court of Appeals for the Ninth Circuit, and pray that this appeal be allowed, and that a transcript of the record and proceedings and papers upon which said order and decree were made, duly authenticated, be sent to the said United States Circuit Court of Appeals for the Ninth Circuit as required by law, on said appeal. [38]

A. J. HENNESSY and
GEO D. COLLINS, Jr.,

Attorneys for Said Appellant Arvid Pearson.

A. J. HENNESSY,
Appellant *in Pro Per.*

Dated at San Francisco this 12th day of January, 1929.

And now to wit, on January 15th, 1929, IT IS ORDERED that the foregoing appeal be and it is hereby allowed as prayed for, the same to operate a *supersedeas* on the order and decree therein specified and on the order of the Referee in Bankruptcy of date October 27th, 1928, in the said matter of Louis Morgan, a bankrupt.

HAROLD LOUDERBACK,
United States District Judge.

[Endorsed]: Filed at 4 o'clock P. M., Jan. 15, 1929. [39]

[Title of Court and Cause.]

ASSIGNMENT OF ERRORS.

Afterwards, to wit, on the 15th day of January, 1929, in this same term, to wit, the October Term, 1928, of the United States Circuit Court of Appeals for the Ninth Circuit, and before the Honorable Judges of the said United States Circuit Court of Appeals, come Arvid Pearson and A. J. Hennessy, the appellants in the above-entitled matter of Louis Morgan, bankrupt, and in the above-entitled cause, and say there is manifest error in the record and proceedings in said matter and cause, and respecting the order and decree of the said United States District Court, Southern Division, Northern District of California, to wit, the order and decree of date January 9th, 1929, made and

entered in said matter of Louis Morgan, a bankrupt, and in the following particulars, viz.: [40]

I.

That the said Southern Division of the United States District Court in and for the Northern District of California, erred in its order, decision and decree of January 9th, 1929, in the said matter of Louis Morgan, a bankrupt, in denying the petition of said appellants as petitioners for a review and annulment of the order of the Referee in bankruptcy of said Morgan, and of date October 27th, 1928, to wit, the order requiring appellants to deliver possession of the boat "Saxon" to the trustee in bankruptcy of said bankrupt.

II.

That the said United States District Court erred in its order, decision and decree of January 9th, 1929, in the said matter of Louis Morgan, a bankrupt, in confirming and approving the report, certificate and said order of the Referee in bankruptcy of said bankrupt, to wit, said order of October 27th, 1928.

III.

That the said United States District Court erred in its order, decision and decree of January 9th, 1929, in confirming, affirming and approving the order of the Referee in bankruptcy in the said matter of Louis Morgan, a bankrupt, to wit, the order of said Referee of October 27th, 1928, requiring appellants to deliver possession of the boat "Saxon" to the trustee in bankruptcy of said bankrupt.

IV.

That the said United States District Court erred in its ruling and decision adverse to the plea of appellants to the jurisdiction of the Referee in bankruptcy of Louis Morgan, a bankrupt, in the matter of the said order of said Referee of October 27th, 1928, and the proceedings on which the said order is based, to wit, the order of said Referee [41] directing appellants to deliver possession of the boat "Saxon" to the trustee in bankruptcy of said bankrupt.

V.

That the said United States District Court erred in its ruling and decision adverse to the plea of appellants to the jurisdiction of the said court and its Referee in bankruptcy of the said Louis Morgan, a bankrupt, to order said appellants to deliver possession of said boat "Saxon" to the trustee in bankruptcy of said bankrupt.

VI.

That the said United States District Court erred in its ruling and decision that said court and its Referee have competent jurisdiction to order in summary proceedings, that appellants deliver possession of the boat "Saxon" to the trustee in bankruptcy of said Louis Morgan, a bankrupt.

VII.

That the said United States District Court erred in its decision and ruling that the said order of the Referee in bankruptcy of said Louis Morgan, of October 27th, 1928, requiring in summary proceed-

ings, that appellants deliver possession of the boat "Saxon" to the trustee in bankruptcy of said bankrupt, is valid and that it is not void for want of authority and for want of jurisdiction to make said order.

VIII.

That the said United States District Court erred in its decision, ruling, order and decree requiring appellants to deliver possession of the boat "Saxon" to the trustee in bankruptcy of said Louis Morgan, a bankrupt.

IX.

That the said United States District Court erred in its decision overruling the objection of appellants as petitioners, to the jurisdiction of said court and its Referee in bankruptcy [42] of said Louis Morgan, a bankrupt, to require and order appellants to deliver possession of said boat "Saxon" to the trustee in bankruptcy of said bankrupt.

X.

That the said United States District Court erred in its decision denying the petition of appellants for an order and decree quashing and annulling the order of said Referee in bankruptcy of said Louis Morgan, a bankrupt, requiring appellants to deliver possession of the boat "Saxon" to the trustee in bankruptcy of said bankrupt, there being no answer filed to said petition by the said trustee in bankruptcy.

XI.

Whereas by the law of the land pertaining to the

matter, the said petition of appellants to the said United States District Court for the review and annulment of said order of said Referee in bankruptcy, to wit, said order of October 27th, 1928, requiring appellants to deliver the possession of the boat "Saxon" to said trustee in bankruptcy of Louis Morgan, a bankrupt, should have been granted by the Court and not denied.

XII.

Wherefore the said appellants Arvid Pearson and A. J. Hennessy pray that the said order and decree of the said United States District Court, of date January 9th, 1929, denying said petition of appellants for the review and annulment of said order of said Referee, of date October 27th, 1928, and the said order and decree of said United States District Court, confirming, approving and sustaining said order of said Referee, together with the said order of said Referee, *be reversed* by the said United States Circuit Court of Appeals for the Ninth Circuit, upon the appeal herein from said orders and decree, and that the appellants be granted [43] such other and further relief as may be just and in conformity with law.

Dated this 15th day of January, 1929.

A. J. HENNESSY, and
GEO. D. COLLINS, Jr.,

Attorneys for Appellant Arvid Pearson.

A. J. HENNESSY,
Appellant *in Pro Per*.

[Endorsed]: Filed at 4 o'clock P. M., Jan. 15, 1929. [44]

BOND ON APPEAL.

KNOW ALL MEN BY THESE PRESENTS: That we, Arvid Pearson and A. J. Hennessy, as principals and Virgil J. Garibaldi and Vera M. Huffman, as sureties, are held and firmly bound unto A. W. Higgins as trustee in bankruptcy of Louis Morgan, a bankrupt in the full and just sum of two hundred and fifty dollars, to be paid to the said A. W. Higgins as said trustee in bankruptcy, his certain attorney, executors, administrators or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 12th day of January, in the year of our Lord one thousand nine hundred and twenty-nine.

WHEREAS, lately at a District Court of the United States for the Northern District of California, Southern Division, in a suit depending in said court between the said Arvid Pearson and A. J. Hennessy as petitioners and the said A. W. Higgins as respondent a decree was rendered against the said petitioners, and the said Arvid Pearson and A. J. Hennessy, having obtained from said court an allowance of an appeal to reverse the said decree in the aforesaid suit, and a citation directed to the said A. W. Higgins as said trustee in bankruptcy of said Louis Morgan, a bankrupt, citing and admonishing him to be and appear at a United States Circuit Court of Appeals for the Ninth Cir-

cuit, to be holden at San Francisco, in the State of California, thirty days from this 12th day of January, 1929. [45]

Now, the condition of the above obligation is such, that if the said Arvid Pearson and A. J. Hennessy shall prosecute the said appeal to effect, and answer all damages and costs if they fail to make their plea good, then the above obligation to be void; else to remain in full force and virtue.

This recognizance shall be deemed and construed to contain the "express agreement" for summary judgment, and execution thereon, mentioned in Rule 34 of the District Court.

ARVID PEARSON (Seal)

A. J. HENNESSY. (Seal)

VIRGIL GARIBALDI. (Seal)

VERA M. HUFFMAN. (Seal)

Acknowledged before me the day and year first above written.

[Seal]

HELEN CLARKE,

Notary Public in and for the City and County of
San Francisco.

United States of America,
Northern District of California,—ss.

Virgil J. Garibaldi and Vera Huffman being duly sworn, each for himself, deposes and says, that he is a householder in said District, and is worth the sum of two hundred and fifty dollars, exclusive of property exempt from execution, and over and above all debts and liabilities.

VIRGIL J. GARIBALDI.

VERA M. HUFFMAN.

Subscribed and sworn to before me, this 12th day of January, A. D. 1929.

[Seal] HELEN CLARKE,
Notary Public in and for the City and County of
San Francisco, State of California.

[Endorsed]: Filed at 4 o'clock P. M., Jan. 15, 1929.

Form of bond and sufficiency of sureties approved this January 15th, 1929.

HAROLD LOUDERBACK,
Judge. [46]

CERTIFICATE OF CLERK U. S. DISTRICT
COURT TO TRANSCRIPT ON APPEAL.

I, Walter B. Maling, Clerk of the United States District Court, for the Northern District of California, do hereby certify that the foregoing 46 pages numbered from 1 to 46, inclusive, contain a full, true and correct transcript of the records and proceedings in the Matter of Louis Morgan, in Bankruptcy, No. 17,170, as the same now remain on file and of record in this office; said transcript having been prepared in accordance with the praecipe for transcript (copy of which is embodied herein), excepting items four and seven thereof—the original documents not being on file in this office.

I further certify that the cost for preparing and certifying the foregoing transcript on appeal is the sum of nineteen dollars and fifty-five cents (\$19.55)

and that the same has been paid to me by the attorneys for the appellants herein.

Annexed hereto is the original citation on appeal.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court, this 18th day of March, A. D. 1929.

[Seal]

WALTER B. MALING,

Clerk.

By C. M. Taylor,

Deputy Clerk. [47]

CITATION ON APPEAL.

United States of America,—ss.

The President of the United States, to A. W.

Higgins as Trustee in Bankruptcy of Louis

Morgan, a Bankrupt, GREETING:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the city of San Francisco, in the State of California, within thirty days from the date hereof, pursuant to an order allowing an appeal, of record in the Clerk's office of the United States District Court for the Southern Division of the Northern District of California, wherein Arvid Pearson and A. J. Hennessy, are appellants, and you are appellee, to show cause, if any there be, why the decree rendered against the said appellants, as in the said order allowing appeal mentioned, should not be corrected, and why

speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable HAROLD LOUDERBACK, United States District Judge for the Southern Division of the United States District Court, Northern District of California, this 15th day of January, A. D. 1929.

HAROLD LOUDERBACK,
United States District Judge.

United States of America,—ss.

On this 16th day of January, in the year of our Lord one thousand nine hundred and twenty-nine, personally appeared before me, Peter Wedvig, the subscriber, and makes oath that he delivered a true copy of the within citation to A. W. Higgins, as trustee in bankruptcy of Louis Morgan, a bankrupt, said Higgins being the appellee and the person named in the within citation, as such appellee.

Subscribed and sworn to before me at San Francisco, this 16th day of January, A. D. 1929.

PETER WEDVIG.

Subscribed and sworn to before me this 16th day of January, 1929.

[Seal]

MARK E. LEVY,
Notary Public in and for the City and County of
San Francisco, State of California.

[Endorsed]: Citation on Appeal. Filed at 3 o'clock and 40 min. P. M. Jan. 16, 1929. [48]

[Endorsed]: No. 5736. United States Circuit Court of Appeals for the Ninth Circuit. Arvid Pearson and A. J. Hennessy, Appellants, vs. A. W. Higgins, as Trustee in Bankruptcy of Louis Morgan, a Bankrupt, Appellee. Transcript of Record. Upon Appeal from the United States District Court for the Northern District of California, Southern Division.

Filed March 18, 1929.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

In the United States Circuit Court of Appeals, for
the Ninth Circuit.

No. 5736.

In the Matter of LOUIS MORGAN, Bankrupt.

ARVID PEARSON and A. J. HENNESSY,
Appellants,

vs.

A. W. HIGGINS, as Trustee in Bankruptcy of
LOUIS MORGAN, a Bankrupt,
Appellee.

SUPERSEDEAS BOND.

WHEREAS on the 25th day of February, 1929, the said United States Circuit Court of Appeals for the Ninth Circuit made and entered in the above-entitled cause an order that the appellants

therein "execute a supersedeas bond in the sum of two thousand dollars." NOW THEREFORE, we, the said appellants Arvid Pearson and A. J. Hennessy, as principals and Lucius L. Solomons and V. J. Garibaldi, of the city and county of San Francisco, State of California, as sureties, are held and firmly bound unto the above-named A. W. Higgins, appellee, as trustee in bankruptcy of Louis Morgan, a bankrupt, in the penal sum of two thousand dollars to be paid said appellee, for the payment of which well and truly to be made, we bind ourselves, and each of us, our and each of our heirs, executors and administrators jointly and severally firmly by these presents.

Sealed with our seals and dated the 12th day of March, A. D. 1929.

The condition of this obligation is such, that if the above-named appellants shall prosecute their appeal herein to effect and answer all damages and costs if they fail to make said appeal good, then this obligation shall be void, otherwise the same shall be and remain in full force and virtue.

ARVID PEARSON.

A. J. HENNESSY.

LUCIUS L. SOLOMONS.

V. J. GARIBALDI.

United States of America,
Northern District of California,
City and County of San Francisco,—ss.

Lucius L. Solomons and V. J. Garibaldi, being duly sworn, each for himself, deposes and says that

he is a resident of the city and county of San Francisco and a householder therein, and has subscribed his name to the foregoing bond as one of the sureties thereon; that he is worth the sum of two thousand dollars over and above all his debts and liabilities exclusive of property exempt from execution.

V. J. GARIBALDI.

LUCIUS L. SOLOMONS.

Subscribed and sworn to before me this 12th day of March, 1929.

[Seal]

EVELYN LA FARGILL,

Notary Public in and for the City and County of San Francisco, State of California.

The foregoing supersedeas bond is hereby approved this 14th day of March, 1929.

FRANK H. RUDKIN,

United States Circuit Judge.

[Endorsed]: Filed Mar. 14, 1929. Paul P. O'Brien, Clerk.

